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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 304

CLAUDE MACK LIGHTFOOT,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES

JOHN J. ABT,
11 Park Place,
New York 7, N. Y.,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 661

CLAUDE MACK LIGHTFOOT, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

REPLY TO BRIEF FOR THE UNITED STATES

This reply is confined to the question presented by the denial of petitioner's motion that the trial judge inspect the report made to the F.B.I. by the prosecution witness Brzek to determine whether it contradicted his testimony and should therefore be made available to the defense (Pet. for Cert., pp. 24-25).

The Solicitor General argues (Br., pp. 21-22) that petitioner's motion was untimely, apparently because it was not made until the witness stepped down from the stand. This point was not made at the trial or in the Court of Appeals. It is urged here for the first time and is without merit.

It is not and could not be asserted that the prosecution was prejudiced in any way by the fact that petitioner did not make his motion before the witness was excused. The government seems to suggest, however, that this fact would have foreclosed petitioner from utilizing the report had the trial judge found it impeaching and made it available to the defense. The suggestion is groundless. Petitioner could have recalled the witness for further cross-examination on the basis of the report. *Belanger* v. *Alton Box*

Board Co. (C. A. 7), 180 F. 2d 87, 94; *Ching* v. *United States* (C. A. 9), 264 F. 639, 642, cert. den., 254 U. S. 630.[1] In the alternative, petitioner could have offered the report in evidence as part of his affirmative case. It is clear, therefore, that petitioner's motion was timely.

The government's only reply on the merits of the motion is to cite *Gordon* v. *United States*, 344 U. S. 414, and *Goldman* v. *United States*, 316 U. S. 129 (Br., p. 21). Its reliance on these decisions is misplaced since neither involved a motion for trial court inspection of the contemporaneous written statement of a witness concerning the subject matter of his testimony. The government studiously ignores the series of cases in the Second, Fourth, Fifth, Eighth and Ninth Circuits (Pet. for Cert., pp. 24-25) in which motions identical with petitioner's were granted.[2] The conflict between these cases and the decision below is irreconcilable. The issue is of general importance to the administration of justice and should be settled by the Court.

Respectfully submitted,

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[1] Earlier in the trial, the judge reserved decision on a motion for the production of the F.B.I. reports of another witness with the understanding that the witness would be subject to recall if the reports were thereafter made available to the defense (R. 424-26).

[2] *Jencks* v. *United States* (C. A. 5), 226 F. 2d 540 (petit. for cert. filed, Dec. 23, 1955, No. 596), contrary to the cases cited in our petition and in accord with the decision below, placed a motion for trial court inspection of F.B.I. reports on the same footing as a motion for their immediate production to the defendant and denied the motion on the authority of the *Gordon* and *Goldman* cases. But cf. *Fisher* v. *United States* (C. A. 9), decided Feb. 15, 1956 (not yet reported), holding that the defense was entitled to the production to it of receipts of an informer witness for monies received from the F.B.I. without a showing that the receipts contradicted the testimony of the witness and notwithstanding that, at most, they would impeach him on a collateral issue.